International Union of Bricklayers and Allied Craftsmen, District Council of Wisconsin, AFL–CIO, Local 5 *and* Oscar J. Boldt Construction Company and Stark Mantel & Tile Company and Milwaukee & Southern Wisconsin District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 30–CD–149

September 30, 1993

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This is a proceeding under Section 10(k) of the National Labor Relations Act. On February 10, 1993,[1] Oscar J. Boldt Construction Company (Boldt) filed the charge in Case 30–CD–149 alleging that the Respondent, International Union of Bricklayers and Allied Craftsmen, District Council of Wisconsin, AFL–CIO, Local 5 (Bricklayers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed conduct with an object of forcing Boldt to have its subcontractor Stark Mantel & Tile Company (the Employer) continue to assign certain work to employees it represents rather than to employees represented by Milwaukee & Southern Wisconsin District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Carpenters). The hearing was held on March 23 and April 1 before Hearing Officer Kathleen L. Rupprecht. The Employer, the Bricklayers, and the Carpenters filed posthearing briefs.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Wisconsin corporation, is a hard tile contractor engaged in all aspects of setting and finishing of hard tile at its New Berlin, Wisconsin facility. During the past calendar year, a representative period, it performed services in excess of $50,000 for customers located outside the State of Wisconsin.

The Charging Party, Oscar J. Boldt Construction Company, a Wisconsin corporation, is a general building contractor with a place of business in Waukesha, Wisconsin. During the past calendar year, a representative period, it has performed services in excess of $50,000 for customers located directly outside the State of Wisconsin.

The parties stipulate, and we find, that Oscar J. Boldt Construction Company and Stark Mantel & Tile Company are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters and the Bricklayers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

On May 21, 1992, the Employer received the subcontract to provide labor, material, and equipment for the installation of the hard tile at the Waukesha West High School project in Waukesha, Wisconsin, from Boldt, the general contractor of the project.

The Employer is signatory to a collective-bargaining agreement with the Bricklayers covering hard tile installation.[2] At all times since the summer of 1990 the Employer has assigned hard tile installation work to its employees represented by Bricklayers, including the installation of the hard tile at the Waukesha project. Boldt is signatory to a collective-bargaining agreement with the Carpenters. Boldt contends that this agreement does not encompass hard tile installation work, but the Carpenters contends that it does.

In December 1992 the Carpenters' business representative, James Judziewicz, contacted a Boldt representative and stated that the hard tile helper work being performed at the Waukesha West High School project belonged to the Carpenters by virtue of the terms of its collective-bargaining agreement with Boldt. The Carpenters later theatened to file a grievance over this subject. Thereafter, the Bricklayers' district director, Thomas DeGarmo, contacted Boldt by telephone and by letters dated February 1, 11, and 18, stating that the hard tile installation helper work belonged to the Bricklayers and threatening ''to picket to shut the job down to preserve our jurisdiction'' if the work was reassigned to employees represented by the Carpenters.

[1] All dates herein are in 1993 unless indicated otherwise.

[2] The Employer employs both hard tile setters and hard tile helpers, who assist the setters by bringing supplies to the worksite and assisting in the setting of the tile. Until 1990, Carpenters Local 47-T of the Milwaukee and Southeast Wisconsin District Council of Carpenters represented the hard tile helpers through successive collective-bargaining agreements with the Associated Tile Contractors of Milwaukee, of which the Employer is a member. When the most recent agreement expired on May 31, 1990, the Tile Contractors and the Carpenters were unable to reach agreement on a new collective-bargaining agreement. The Carpenters commenced a strike on July 24, 1990, and subsequently the helpers crossed the picket line and returned to work as members of the Bricklayers.

On March 6, 1992, the Bricklayers were certified as the bargaining representative of the Employer's full-time and regular part-time employees performing the installation of hard tile, i.e., the setters and the helpers. Subsequently, the Employer signed a collective-bargaining agreement with the Bricklayers setting forth terms and conditions of employment for these unit employees.

B. *Work in Dispute*

The work in dispute involves all the hard tile helper work on the Waukesha West High School project.

C. *Contentions of the Parties*

The Employer, Boldt, and the Bricklayers contend that there is reasonable cause to believe that the Bricklayers violated Section 8(b)(4)(D) of the Act by threats to picket, that no voluntary means exists for adjustment of the jurisdictional dispute, and that the work in dispute should be awarded to employees represented by the Bricklayers on the basis of the Employer's collective-bargaining agreement with the Bricklayers, the Employer's preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

The Carpenters contends that this is not a traditional jurisdictional dispute but rather a dispute involving Boldt's breach of the subcontracting clause of its collective-bargaining agreement with the Carpenters.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute. It is uncontroverted that Wisconsin Bricklayers District Council Director Thomas DeGarmo threatened to picket Boldt if the disputed work was reassigned to employees represented by the Carpenters. The record reveals no agreed-upon method for voluntary adjustment of the dispute binding on all parties.

Based on the above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.[3]

[3] Member Devaney finds, for the reasons stated in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790 (1990), that Carpenters' demand for the disputed work, as well as its threat to file a grievance over this subject, clearly demonstrates that Carpenters has made a competing claim for this work.

Member Raudabaugh finds that this case is distinguishable from *Slattery*, supra. In *Slattery*, the union filed a grievance against the general contractor seeking ony monetary damages. Here, however, the Carpenters made an explicit claim for the disputed work and did not contend that the grievance which it threatened to file would be limited to seeking monetary damages. Accordingly, without deciding whether *Slattery* was correctly decided, Member Raudabaugh would find reasonable cause to believe that the Carpenters' conduct constitutes a claim for work in the circumstances of this case.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electric Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

As noted above, the Bricklayers were certified on March 6, 1992, as the exclusive bargaining representative of the Employer's hard tile setters and helpers, and the Bricklayers and the Employer are parties to a collective-bargaining agreement effective June 1, 1993, through May 31, 1996, covering these employees. The Carpenters contends that its collective-bargaining agreement with Boldt encompasses the disputed work, but Boldt disputes this contention. Even assuming arguendo that the disputed work is encompassed by the Carpenters' agreement with Boldt, that factor would not be relevant in making the determination of this dispute because there is no evidence that the Employer is a party to any agreement with the Carpenters or has agreed to be bound by the terms of any Carpenters agreement. Under these circumstances, the Board has determined that it is the subcontractor's collective-bargaining agreements, and not those of the general contractor, that are relevant. *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300 and cases cited at fn. 12 (1982). As the Board has stated the ''[general contractor's] contractual obligations cannot be conferred upon the [subcontractor] absent record evidence establishing that the [subcontractor] has agreed to be bound by these obligations.'' *Iron Workers Local 21 (Lueder Construction)*, 233 NLRB 1139, 1140 (1977). Accordingly, we find that this factor favors an award of the disputed work to employees represented by the Bricklayers.

2. Company preference and past practice

Since 1990 the Employer has consistently assigned hard tile installation work, including the helper work in dispute, to employees represented by the Bricklayers and prefers to continue this practice. We find that this factor favors an award of the disputed work to employees represented by the Bricklayers.

3. Area and industry practice

Witnesses for the Employer and the Bricklayers testified that tile layers and helpers represented by the

Bricklayers perform 90 percent of the tile installation work in the area. Over 80 percent of this work is performed pursuant to the Bricklayers collective-bargaining agreements with the four major tile contractors in the area through the Associated Tile Contractors of Milwaukee, of which the Employer is a member.

Alan Lippert, president of the Tile Contractors Association of America, testified without contradiction that because of the technological changes in the industry there has been a substantial decrease in the need for helpers but that with few exceptions all areas of hard tile installation, including helper work, are performed by employees represented by the Bricklayers. We find that the factor of area and industry practice favors an award of the work in dispute to employees represented by the Bricklayers.

4. Relative skills

The Employer's vice president testified without contradiction that the Employer's tile helper employees represented by the Bricklayers are qualified to use the equipment necessary to perform the work in dispute and had done all such work for the Employer during the preceding 2 years. The Carpenters did not present any evidence that employees of contractors represented by the Carpenters possessed skills equal to or superior to those of employees represented by the Bricklayers. We find that the factor of relative skills favors the award of the work in dispute to employees represented by the Bricklayers.

5. Economy and efficiency of operations

Witnesses for the Employer testified without contradiction that by 1989, due to technological changes including thin set tile, there was much less work for tile helpers and that the majority of all tile work, including helper work, is performed exclusively by setters. Since 1990, 70 to 80 percent of the Employer's projects have been performed by setters without any helpers. According to the Employer's witnesses, the decline in the amount of work for tile helpers makes its less efficient to use employees who can only do helper work rather than tile setters who can do the work of tile helpers in addition to their own. Thus, according to the Employer, since the Carpenters represents helpers but not setters, it is less efficient to use employees represented by Carpenters rather than those represented by the Bricklayers, who represent both setters and helpers. In addition, the Carpenters' collective-bargaining agreements with contractors require a ratio of one helper for every three setters whereas the Bricklayer's collective-bargaining agreements require one helper for every four setters. This requirement would result in the Employer having to hire additional employees who would not have enough work to do all day.

Accordingly, we find that this factor favors an award of the work in dispute to employees represented by the Bricklayers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Bricklayers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of certification and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Bricklayers, not to that Union or its members.

Scope of Award

The Employer seeks a broad award of the disputed work, covering locations in Carpenters Area 2, a 13-county area around Milwaukee. It contends that in light of the Bricklayers' threat to picket, which was not limited to the instant project, the dispute extends to all projects located in Area 2.

The Board has customarily declined to grant an area wide award in cases such as this in which the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Laborers Local 150 (Paul H. Schwendener, Inc.)*, 304 NLRB 623, 625 (1991). Accordingly, in the circumstances of this case, we find a broad award unwarranted. Therefore, the present determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute. Employees of Stark Mantel and Tile Company, represented by International Union of Bricklayers and Allied Craftsmen, District Council of Wisconsin, AFL–CIO, Local 5, are entitled to perform the hard tile helper work on the Waukesha West High School project in Waukesha, Wisconsin.

CHAIRMAN STEPHENS, dissenting.

In this case the Carpenters at no time engaged in any coercion or threats of coercion. Its claim to the work in dispute consisted solely of statements to the general contractor (Boldt) that the Carpenters believed that Boldt's subcontracting the work to an employer who did not have a contract with the Carpenters would violate the collective-bargaining agreement between Boldt and the Carpenters. The Carpenters has submitted a copy of that agreement. On the basis of that evidence and the Carpenters' contentions, I find that it has at least an arguably meritorious claim that Boldt violated the signatory subcontracting provisions of that

agreement when it subcontracted the work to the Employer. For the reasons stated in my dissenting opinion in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790–792 (1990), I would find that there are no competing claims for the work, and I would quash the 10(k) notice.